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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/759,163
Filing Date: January 16, 2001
Appellant(s): PESTONI ET AL.

Randy W. Lacasse
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 6/6/06 appealing from the Office action mailed
1/20/06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

PR Newswire, "eMedia-IT and Lloyds of London Provide Global Insurance for Digital Content"
(March 3, 2000), pg. 1

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over “eMedia-IT and Lloyds of London Provide Global Insurance for Digital Content” by PR Newswire (hereinafter “Newswire”) in view of U. S. Patent No. 6,708,157 to Stefik et al.

As per claim 1, Newswire teaches obtaining global insurance for digital content thanks to an alliance between eMedia-IT Solutions and Lloyds of London called Insure-IT (see: abstract). Newswire also teaches that subscriber to MediaDepot offer their client the option to purchase an insurance policy specific to their community (see: paragraph 2). In addition, Newswire teaches that no application form and no approval process are necessary to obtain the insurance package for a nominal fee (see: paragraph 6). Additionally, Newswire teaches coverage includes, but is not limited to, loss of service, defamation of subscriber’s reputation or character, infringement of any right to privacy, plagiarism, piracy, infringement of copyright, and damage to files (reads on “insurance insuring said consumer against loss of said specified digital content”) (see: paragraph 6). Basic coverage through the MediaDepot insurance policy is \$250 (U.S.) per year (reads on “purchased content insurance”) and also can be customized for subscriber’s special needs (see: paragraph 6). Furthermore, Newswire teaches that the service provides a secure environment where creative professionals and their clients can store, revise, track (reads on “maintaining

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information identifying said consumer and indicating said consumer has purchased content insurance on said specified digital content”) and distribute their files throughout the world (see: paragraph 7).

Newsire fails to teach:

--the claimed receiving an indication said consumer has made a claim to recover lost digital content;

--the claimed verifying said lost digital content is the same as said specified digital content for which said content insurance was purchased; and

--the claimed enabling said consumer to receive a new copy of said specified digital content via said communication networks.

Stefik et al. teaches for controlling the distribution and use of digital work using digital tickets including a restore transaction where a request is made to convert a backup copy of a digital work into a usable copy (see: column 38, lines 6-12). In addition, Stefik et al. teaches a requester sends a message to initiate a restore transaction and a server verifies that the content file is available (i.e. a digital work corresponding to the request has been backed-up) (see: column 38, lines 13-21). Stefik et al. also teaches that the server transmits the requested contents and data to the requester according to the transmission protocol (see: column 38, lines 27-28).

One of ordinary skill in the art at the time the invention was made would have found it obvious to include restore transaction as taught by Stefik et al. within the global insurance for digital content called Insure-IT as taught by Newsire with the motivation of providing a reliable and secure way of protecting and compensating a user in case of catastrophic media failure (see: Stefik et al.: column 38, lines 6-12).

As per claim 2, Stefik et al. teaches the claimed new copy of said specified digital content is in the same format as said lost digital content. This limitation is met by the restore transaction where a request is made to convert a backup copy of a digital work into a usable copy (see: column 38, lines 6-12).

As per claim 3, Stefik et al. teaches the claimed content insurance further allows said consumer to upgrade said specified content to a new encoding format. This feature met by the consumer buying the digital work with an agreement that he could upgrade to new version at a later date (see: column 46, lines 51-56).

As per claim 4, Stefik et al. teaches a consumer buys a digital work together with an agreement to upgrade to a new version at a later date for a modest fee, much less than the usual purchase price (see: column 47, lines 16-21). In addition, Stefik et al. teaches that when the new version becomes available, the customer can go to anyone who has the upgraded version and make the transaction (see: column 41, lines 16-21). Furthermore, Stefik et al. teaches a restore transaction where a request is made to convert a backup copy of a digital work into a usable copy (see: column 38, lines 6-12). Stefik et al. teaches that a requester sends a message (reads on “receiving an indication said consumer has made a claim”) to initiate a restore transaction and a server verifies (reads on “verifying digital content”) that the content file is available (i.e. a digital work corresponding to the request has been backed-up) (see: column 38, lines 13-21). Stefik et al. also teaches that the server transmits the requested contents and data to the requester (reads on “enabling said consumer to receive a new copy of said specified digital content encoded in a new encoding format via said communication networks”) according to the transmission protocol (see: column 38, lines 27-28).

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As per claim 5, Stefik et al. teaches method further comprising:

--the claimed charging said consumer an amount for said new copy of said specified digital content encoded in a new encoding format which is a fraction of the price for a new purchase of said specified digital content in said new encoding format. This limitation is met by a consumer buying a digital work together with an agreement to upgrade to a new version at a later date for a modest fee, much less than the usual purchase price (see: column 47, lines 16-21).

As per claim 6, Stefik et al. teaches the claimed terms and conditions of said content insurance include any of:

a limited number of format upgrades or a limited time for which upgrades are available with the option of renewal. This limitation is met by limiting the number of format upgrades to one per copy of the digital work (see: column 47, lines 23-25).

As per claim 7, Stefik et al. teaches the claimed content insurance was purchased at a cost, which is a fraction of the price of said specified digital content. This limitation is met by a consumer buying a digital work together with an agreement to upgrade to a new version at a later date for a modest fee, much less than the usual purchase price (see: column 47, lines 16-21).

As per claim 8, Stefik et al. teaches the claimed terms and conditions of said content insurance includes any of:

restrictions on the number of claims that can be filed, payment of a deductible for a claim, requiring disclosure of private information by said consumer when making a claim, or having a limited term with the option of renewal. This feature is met by restrictions on the number of claims that can be filed to one per copy of the digital work (see: column 47, lines 23-25).

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(A) Claims 1-8 have been amended to now recite the step of “...purchased distributed digital content”, “...said purchased digital content”, “...specified purchased digital content”, and “...said content insurance was also purchased”.

As per the limitations “...purchased distributed digital content” and “...said purchased digital content”, it has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

As per the limitation “...specified purchased digital content” and “...said content insurance was also purchased”. The Newswire reference is relied on for teaching the obtaining global insurance for digital content called Insure-IT (see: abstract). Additionally, Newswire teaches coverage includes, but is not limited to, loss of service, defamation of subscriber’s reputation or character, infringement of any right to privacy, plagiarism, piracy, infringement of copyright, and damage to files (see: paragraph 6). The Examiner considers the Insure-IT insurance as coverage against damaged files such as insuring digital content against a loss. The Stefik reference is relied on for teaching a digital ticket that may be used to in many commercial scenarios such as the purchase of software, which is the digital content (see: column 4, lines 24-26). In addition, Stefik teaches a consumer buys a digital work together with an agreement to upgrade to a new version at a later date for a modest fee, much less than the usual purchase price (see: column 47, lines 16-21).

The motivation to combine the teachings of Stefik within the Newswire reference are discussed in the rejection of claim 1 in the previous Office Action dated 8/1/05, and incorporated herein.

(10) Response to Argument

In the Appeal Brief filed 22 May 2006, Appellant makes the following arguments:

(A) Newswire does not include steps to provide the user with their original content and storing the purchased digital content as well as no nexus between insurance and replacement of original purchase content exists.

(B) eMedia-IT provides no means to return the user a copy of original purchased digital content and a different encoding format of the original.

(C) The elements of the claims must be functionally similar and must be interpreted fully in light of the corresponding specification, claims and drawing and the teachings or suggestion to make the claimed combination and the reasonable expectation of success must be both found in the prior art and not based on applicant disclosure.

(D) No reason, suggestion, motivation, or teachings to combine eMedia-IT with Stefik other than the Examiner's reading of the claim requirements and such a combination teaches nothing about the ability to provide copies upon failure or loss.

(E) eMedia-IT focuses on securely storing a user's data teaches away from Stefik as Stefik is interested in distribution on an author's digital works, not the user's and there is no upgrading to future encoding formats.

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(F) Neither the eMedia-IT reference nor the Stefik patent provide nor suggest steps to process a claim against an insured loss and therefore cannot provide the receiving and verifying steps of claim 1.

(G) Neither the eMedia-IT reference nor the Stefik patent provide nor suggest enabling said consumer to receive a new copy of said specified purchased digital content via said communication networks.

(H) Stefik does not sell the customer insurance and therefore cannot satisfy the claim language elements as recited in claim 7.

(I) eMedia-IT and Stefik are silent on the features of claim 8 "...includes any of: restrictions on the number of claims that can be filed, payment of a deductible for a claim, requiring disclosure of private information by said consumer when making a claim, or having a limited term with the option of renewal".

Examiner will address Appellant's arguments in sequence as they appear in the brief.

Response to Argument (A):

In response to the first argument, the Examiner respectfully submits that the Stefik et al. reference teaches controlling the distribution and use of digital work using digital tickets including a restore transaction where a request is made to convert a backup copy of a digital work into a usable copy (see: column 38, lines 6-12). In addition, Stefik et al. teaches a requester sends a message to initiate a restore transaction and a server verifies that the content file is available (i.e. a digital work corresponding to the request has been backed-up) (see: column 38, lines 13-21). Stefik et al. also teaches that the server transmits the requested contents and data to the requester according to the transmission protocol (see: column 38, lines 27-28). This clearly

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shows that once the verification of the stored digital content is located, a back copy or the original digital work is providing to the user via a communication network. Furthermore, Stefik et al. teaches a restore transaction where a request is made to convert a backup copy of a digital work into a usable copy (see: column 38, lines 6-12). This further discloses that a backup copy or original digital work is stored and can be converted into a usable copy upon request. The Newswire reference is relied on for teaching the obtaining of global insurance for digital content called Insure-IT (see: abstract). Additionally, Newswire teaches that the service provides a secure environment where creative professionals and their clients can store, revise, track and distribute their files throughout the world (see: paragraph 7). This suggests that the insurance policies themselves which include information such as policy numbers, name of insured, type of digital work insured, etc... are tracked, stored and maintained in a secure environment to possibly identify and verify insurance coverage as needed.

Moreover, it has been held that a prior art reference must either be in the field of Appellant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the Appellant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992).

Firstly, the Examiner respectfully submits that the prior art references are in the field of Appellant's endeavor. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). Appellant's invention pertains to method of insuring purchased distributed digital content for a consumer. The Examiner respectfully submits in this case that the primary reference, Newswire, was relied upon for teachings of obtaining global insurance for digital content called Insure-IT (see: abstract). Additionally, Newswire teaches coverage includes, but is not limited to, loss of

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service, defamation of subscriber's reputation or character, infringement of any right to privacy, plagiarism, piracy, infringement of copyright, and damage to files (see: paragraph 6). Stefik was relied on for teaching a digital ticket that may be used to in many commercial scenarios such as the purchase of software, which is the digital content (see: column 4, lines 24-26). In addition, Stefik et al. teaches a restore transaction where a request is made to convert a backup copy of a digital work into a usable copy (see: column 38, lines 6-12). Thus, it is the position of the Examiner that Newswire and Stefik et al. are in the field of the Appellant's endeavor (i.e., they relate to purchasing digital insurance (Newswire) and using a digital ticket to receive a restored copy of the digital work (Stefik), and are therefore analogous art.

Secondly, the Examiner respectfully submits that the prior art references are reasonably pertinent to the particular problem with which the Appellant was concerned. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). Newswire and Stefik et al. are directed to solving the problem of purchasing digital insurance and using a digital ticket to receive a restored copy of the digital work (see: Newswire paragraph 2, 6 and 7 and Stefik et al. column 38, lines 6-12, column 38, lines 13-21 and column 38, lines 27-28). The present application also seeks to solve a similar problem, namely, protecting and upgrading digital content in a digital content distribution system through the use of content insurance (see: page 2, lines 3-5 of specification). Thus, it is the position of the Examiner that the prior art references are reasonably pertinent to the particular problem with which the Appellant was concerned and the applied references are analogous art as they all relate to method of insuring purchased distributed digital content for a consumer.

Response to Argument (B):

In response to the second argument, the Examiner respectfully submits that Stefik et al. reference is relied for providing the user with a copy of the original purchased digital content. Stefik et al. teaches that a consumer buys a digital work together with an agreement to upgrade to a new version at a later date for a modest fee, much less than the usual purchase price (see: column 47, lines 16-21). In addition, Stefik et al. teaches that when the new version becomes available, the customer can go to anyone who has the upgraded version and make the transaction (see: column 41, lines 16-21). Furthermore, Stefik et al. teaches a restore transaction where a request is made to convert a backup copy of a digital work into a usable copy (see: column 38, lines 6-12). Moreover, Stefik teaches that usage rights are treated as part of a digital work and usage rights statements are encoded in suitable form for accessing during the processing of a transaction such as whether a digital work can be copied, when and how it can be used and what fees are to be charged (see: column 17, lines 40-53 and column 11, lines 16-17). Therefore, the Examiner considers any purchased upgraded version of a digital content to include encoded format changes.

Response to Arguments (C) and (D):

In response to the third and fourth arguments, the Examiner respectfully submits that obviousness is determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. See *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992); *In re Hedges*, 783 F.2d 1038, 1039, 228 USPQ 685,686 (Fed. Cir. 1992); *In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785,788 (Fed. Cir. 1984); and *In re Rinehart*, 531 F.2d 1048, 1052, 189 USPQ 143,147 (CCPA 1976). Using this standard, the Examiner respectfully submits that he has at least satisfied the burden of presenting a *prima facie* case of obviousness, since he

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has presented evidence of corresponding claim elements in the prior art and has expressly articulated the combinations and the motivations for combinations that fairly suggest Applicant's claimed invention (see paper dated 8/1/05).

As such, the Examiner recognizes that references cannot be arbitrarily altered or modified and that there must be some reason why one skilled in the art would be motivated to make the proposed modifications. However, although the Examiner agrees that the motivation or suggestion to make modifications must be articulated, it is respectfully contended that there is no requirement that the motivation to make modifications must be expressly articulated within the references themselves. References are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures, *In re Bozek*, 163 USPQ 545 (CCPA 1969).

The Examiner is concerned that Applicant apparently ignores the mandate of the numerous court decisions supporting the position given above. The issue of obviousness is not determined by what the references expressly state but by what they would reasonably suggest to one of ordinary skill in the art, as supported by decisions in *In re DeLisle* 406 Fed 1326, 160 USPQ 806; *In re Kell, Terry and Davies* 208 USPQ 871; and *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ 2d 1596, 1598 (Fed. Cir. 1988) (citing *In re Lalu*, 747 F.2d 703, 705, 223 USPQ 1257, 1258 (Fed. Cir. 1988)). Further, it was determined in *In re Lamberti et al*, 192 USPQ 278 (CCPA) that:

- (i) obviousness does not require absolute predictability;
- (ii) non-preferred embodiments of prior art must also be considered; and
- (iii) the question is not express teaching of references, but what they would suggest.

Further, according to *In re Jacoby*, 135 USPQ 317 (CCPA 1962), the skilled artisan is presumed to know something more about the art than only what is disclosed in the applied

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references. In *In re Bode*, 193 USPQ 12 (CCPA 1977), every reference relies to some extent on knowledge of persons skilled in the art to complement that which is disclosed therein.

According to *Ex parte Berins*, 168 USPQ 374 (Bd. Appeals), there is no statutory limitation as to the number of references that may be used to demonstrate obviousness...not what references expressly state but what they would reasonably suggest to one of ordinary skill in the art. In *In re Conrad*, 169 USPQ 170 (CCPA), obviousness is not based on express suggestion, but what references taken collectively would suggest.

As such, it is respectfully submitted that an explanation based on logic and sound scientific reasoning of one ordinarily skilled in the art at the time of the invention that support a holding of obviousness has been adequately provided by the motivations and reasons indicated by the Examiner both in the prior Office Action, *Ex parte Levengood*, 28 USPQ2d 1300 (Bd. Pat. App. & Inter., 4/22/93).

In addition, the primary motivation for combining the respective teachings of Newswire and Stefik et al. was clearly recited as "...providing a reliable and secure way of protecting and compensating a user in case of catastrophic media failure" (see: paper dated 8/1/05, starting last paragraph of page 4 to page 5). Not only was this motivation explicitly recited in the rejection of the claims, it was based solely on the teachings of the prior art, namely, column 38, lines 8-10 of Stefik et al. As such, the Examiner respectfully contends that the first requirement needed to establish a *prima facie* case of obviousness, namely, a showing of a suggestion or motivation, either in the references or in the knowledge generally available to one of ordinary skill in the art, has been clearly established in the rejection applied in this case.

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Furthermore, Newswire teaches global insurance for digital content called Insure-IT with coverage that includes, but is not limited to, loss of service, defamation of subscriber's reputation or character, infringement of any right to privacy, plagiarism, piracy, infringement of copyright, and damage to files (see: abstract and paragraph 6). This clearly indicates that the digital work is insured against a loss or failure and the copies are provided using the restore transaction where a request is made to convert a backup copy of a digital work into a usable copy as described by Stefik et al. (see: Stefik et al.: column 38, lines 6-12).

Response to Argument (E):

In response to the fifth argument, the Examiner respectfully submits that this is not evidence that the applied references teach away from applicant invention. In addition, it is the Newswire reference relied on for the teachings of global insurance for digital content called Insure-IT with coverage that includes, but is not limited to, loss of service, defamation of subscriber's reputation or character, infringement of any right to privacy, plagiarism, piracy, infringement of copyright, and damage to files (see: abstract and paragraph 6). Stefik is relied on for teaching consumer's buying digital works together with an agreement to upgrade to a new version at a later date for a modest fee, much less than the usual purchase price (see: column 47, lines 16-21). Furthermore, it is respectfully submitted that if Appellant's were correct in his assertion which Examiner does not admit, it has been held that prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

Response to Arguments (F) and (G):

In response to the sixth and seventh arguments, the Examiner respectfully submits that the Newswire reference, and not Stefik, *per se*, that was relied upon for the specific teaching of obtaining global insurance for digital content called Insure-IT (see: abstract). Additionally, Newswire teaches coverage includes, but is not limited to, loss of service, defamation of subscriber's reputation or character, infringement of any right to privacy, plagiarism, piracy, infringement of copyright, and damage to files (see: paragraph 6). Stefik et al. reference is relied on for teaching a consumer buys a digital work together with an agreement to upgrade to a new version at a later date for a modest fee, much less than the usual purchase price (see: column 47, lines 16-21). In addition, Stefik et al. teaches that when the new version becomes available, the customer can go to anyone who has the upgraded version and make the transaction (see: column 41, lines 16-21). Furthermore, Stefik et al. teaches a restore transaction where a request is made to convert a backup copy of a digital work into a usable copy (see: column 38, lines 6-12). Stefik et al. teaches that a requester sends a message to initiate a restore transaction and a server verifies that the content file is available (i.e. a digital work corresponding to the request has been backed-up) (see: column 38, lines 13-21). The Examiner considers a requester sending a message (starting a claim) to initiate the restore transaction is equivalent to the step of claim 1 that recites, "receiving a indication said consumer has made a claim to recover lost digital content". In addition, Stefik's server verifies that the digital content is the same as the originally purchased digital content and transmits the requested contents and data to the requester according to the transmission protocol (see: column 38, lines 27-28). Therefore, Stefik teaches the claimed processing a claim, verifying the digital content and enabling the consumer to receive a restored copy of the digital content. Thus, the proper combination of the applied references would be the

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incorporation of Stefik et al. processing a claim, verifying the digital content and enabling the consumer to receive a restored copy of the digital content within the insurance for digital content called Insure-IT of Newswire.

Response to Argument (H):

In response to the eighth argument, the Examiner respectfully submits that the Newswire reference, and not Stefik, *per se*, that was relied upon for the specific teaching of obtaining global insurance for digital content called Insure-IT (see: abstract). Additionally, Newswire teaches coverage includes, but is not limited to, loss of service, defamation of subscriber's reputation or character, infringement of any right to privacy, plagiarism, piracy, infringement of copyright, and damage to files (see: paragraph 6). Basic coverage through the MediaDepot insurance policy is \$250 (U.S.) per year and also can be customized for subscriber's special needs (see: paragraph 6). Stefik was relied on for primarily teaching a digital ticket that may be used to in many commercial scenarios such as the purchase of software, which is the digital content (see: column 4, lines 24-26). In addition, Stefik et al. teaches a restore transaction where a request is made to convert a backup copy of a digital work into a usable copy (see: column 38, lines 6-12). Thus, the proper combination of the applied references would be the incorporation of Stefik et al. purchasing of digital content including a restore transaction within the purchase of basic or customized insurance coverage of Newswire.

Response to Argument (I):

In response to the ninth argument, the Examiner respectfully submits that the claim language uses the terms "...include any of" and is written in the alternative, therefore satisfying this limitation would only require finding either "restrictions on the number of claims that can be

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filed, payment of a deductible for a claim, requiring disclosure of private information by said consumer when making a claim, or having a limited term with the option of renewal". The Stefik reference teaches the restrictions on the number of claims that can be filed to one per copy of the digital work (see: column 47, lines 23-25).

(11) Related Proceeding(s) Appendix


No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.


For the above reasons, it is believed that the rejections should be sustained.


Respectfully submitted,


Robert Morgan
Assistant Patent Examiner
Tech Center 3600

Conferees:


Joseph Thomas
Supervisory Patent Examiner
Tech Center 3600


Robert Weinhardt
Business Practice Specialist
Tech Center 3600


JOSEPH THOMAS
SUPERVISORY PATENT EXAMINER